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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1970

70-224

No. 1767

E. H. HOLCOMB, JR.,
Petitioner,

vs.

CESSNA AIRCRAFT COMPANY, and CONTINENTAL MOTORS CORPORATION,
Respondents.

BRIEF OF RESPONDENT, CESSNA AIRCRAFT COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

Argument—

Whether the Opinion of the Fifth Circuit Court of Appeals Conflicts with Decisions from Other Circuit Courts of Appeal or Decisions from the Supreme Court of the United States 3

Conclusion 7

Certificate of Service 8

CASE CITED

Lavender v. *Kurn*, 327 U.S. 645 (1946) 5, 6

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QUESTIONS PRESENTED

In this Brief, Petitioner, E. H. HOLCOMB, JR., who was Plaintiff in the District Court in the Middle District of Florida and Appellee in the Fifth Circuit Court of Ap-

peals, will be referred to as Petitioner. Respondent, CESSNA AIRCRAFT COMPANY, who was a co-defendant in the District Court in the Middle District of Florida and Appellant in the Fifth Circuit Court of Appeals, will be referred to as CESSNA. Respondent, CONTINENTAL MOTORS, who was a co-defendant in the District Court in the Middle District of Florida and Appellant in the Fifth Circuit Court of Appeals, will be referred to as CONTINENTAL. The following symbols will be used:

"O"—Opinion of the Fifth Circuit Court of Appeals[1]

"P"—Petition for a Writ of Certiorari filed by E. H. HOLCOMB, JR.

"B"—Brief of Respondent, CONTINENTAL MOTORS CORPORATION

"R"—Record on Appeal

CESSNA hereby adopts and incorporates by reference the statements of CONTINENTAL with respect to the questions here presented.[2]

STATEMENT OF THE CASE

In addition to the procedural history of this case set forth in the Petition itself and in the Brief of CONTINENTAL, it should be noted that, although the Amended Complaint filed by Petitioner asserted theories of implied warranty and expressed warranty, at the close of Petitioner's case, the trial court directed a verdict against Petitioner on the expressed warranty theory and the case went to the jury solely on the basis of implied warranty theories against CONTINENTAL and CESSNA. Petitioner did not appeal the ruling of the trial court on the expressed

1. The decision of the Fifth Circuit is now reported at 439 F.2d 1150.

2. (B 2).

warranty theory. Subsequent to the decision of the Fifth Circuit Court of Appeals, Petitioner filed no Petition for Rehearing asserting that the Fifth Circuit may have overlooked or misapprehended particular points of law or fact, as provided for by Rule 40, Federal Rules of Appellate Procedure.

Finally, in connection with the testimony by Petitioner that he had talked with a CESSNA representative about certain overheating problems relating to the Continental engines (P 5), Petitioner also testified that he did not know if there was any relation between any such problems with the military aircraft at Ft. Rucker and any problem he alleged with the Cessna 310K in question. (R 384)

In all other respects, CESSNA hereby adopts and incorporates the Statement of the Case contained in CONTINENTAL'S Brief filed herein.

ARGUMENT

Whether the Opinion of the Fifth Circuit Court of Appeals Conflicts with Decisions from Other Circuit Courts of Appeal or Decisions from the Supreme Court of the United States.

Rather than repeat arguments and authorities presented by CONTINENTAL or attempt to cite additional authorities which might be cumulative, this Respondent hereby adopts and incorporates the contents of CONTINENTAL'S Argument as set forth in CONTINENTAL'S Brief in this cause and, accordingly, the argument here presented will be limited in scope to discussion of matters not previously discussed by CONTINENTAL.

Petitioner attempts to challenge the decision of the Fifth Circuit by referring this Court to two excerpts from the trial testimony. The first relates to problems that

similar engines in different aircraft encountered at Ft. Rucker, Alabama.[3]. The second item upon which Petitioner relies is the testimony of Petitioner's pilot, Mr. Matthews, that, in his opinion, the cause of the low compression readings at the 182 hour inspection "would revert back to the manufacturer."[4]

Aside from the undisputed evidence that the military planes at Ft. Rucker were operated under rigorous training conditions including full power stalls, slow speed plays, and winterization for operations at 55 or 60 degrees below zero and the further undisputed proof that upon correction of these conditions the engines lasted for a "phenomenal length of time," it is interesting to note that, in discussing the engines used at Ft. Rucker, Petitioner himself testified that he did not know if there was any relation between the Ft. Rucker training incident and any problem he had with his engine. (A 384) Of course, there was no evidence whatsoever from any other source either which indicated any relationship at all between the training problem at Ft. Rucker and Petitioner's alleged difficulty.

With respect to the testimony of Mr. Matthews, the Fifth Circuit has noted that, on cross-examination, Mr. Matthews *himself* undermined any possible significance which might have been attributable to his opinion on direct examination. Whereas upon direct examination Mr. Matthews stated that "it would revert back to the manufacturer," on cross-examination he made the following statements:

"I didn't say it was a defect"

"I don't know what it is"

---

3. (P. 5).
4. (P 5, O 13).

"I didn't say that it was faulty manufacturing. You ask me what caused this in the engine. I don't know what caused it."

"I imagine that extra tolerance wore in there."

"I would assume that it would be the wear" (O 13-15)

Petitioner argues that, in noting the contradictions in Mr. Matthews' testimony, the Fifth Circuit has determined the credibility of the testimony of Mr. Matthews. (P 6-7) If this be an instance of determining credibility, it is obvious that it is also an instance in which the determination can be made without viewing the witness in person.

Since the Fifth Circuit has held that "the evidence wholly failed to demonstrate any manufacturer's defect in the engines at the time of delivery," it is only reasonable to assume that if in fact there was any evidence of such a defect then Petitioner would certainly have filed a Petition for Rehearing in the Fifth Circuit calling to the attention of that court such evidence. No such petition was filed in the Fifth Circuit and the Petition filed with this Court likewise fails to demonstrate any manufacturer's defect in the engines at the time of delivery.

It is this basic flaw in Petitioner's case which is fatal and which distinguishes the instant case from *Lavender* v. *Kurn*, 327 U.S. 645 (1946), cited in the Petition. In that decision by this Court, there was evidence of a mail hook hanging from a train which could have injured the plaintiff. This Court held that the evidence in the case provided a reasonable basis for inferring that the hook in fact struck the plaintiff and caused his injury. In reaching its decision, this Court noted that the inference which the jury would be required to make:

> "*Cannot* be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury." (327 U.S. at 652 (Emphasis added)

In the instant case, however, there is not only a lack of direct evidence of a causal relationship, as in the *Lavender* case, but there is also a lack of any evidence of a defect [mail hook]. Certainly, therefore, in the instant case, it *can* be said that there are no probative facts to support any inference of a defect causing any problem with Petitioner's plane and it *can* also be said that any such inference would be so unreasonable as to warrant taking the case from the jury.

CONCLUSION

The Fifth Circuit Court of Appeals has exhaustively reviewed the voluminous record in this case and has concluded unanimously that Petitioner's "evidence wholly failed to demonstrate any manufacturer's defect in the engines at the time of delivery." (O-19)

There is no basis in law or in fact for Petitioner's challenge to the Fifth Circuit's decision. Not one of the decisions cited by Petitioner as alleged sources of conflict indicates that the Fifth Circuit exceeded its proper role in reaching its decision. Petitioner's contention that the Fifth Circuit's decision conflicts with decisions of other circuit courts or with decisions of this Court is wholly without merit. Therefore, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent, Cessna Aircraft Company, in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been sent by mail this 29th day of June, 1971, to John I. Van Voris, Esquire, of Shackleford, Farrior, Stallings & Evans, P.A., Post Office Box 3324, Tampa, Florida 33601, attorney for Petitioner; and to John T. Allen, Esquire, of Harrison, Greene, Mann, Davenport, Rowe & Stanton, Post Office Drawer D, St. Petersburg, Florida 33701, attorneys for Continental Motors Corporation.

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Attorney